88-751

Supreme Court, U.S.
FILED
OCT 11 1988
JOSEPH F. SPANIOL, JR.
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No. ———

In The

# Supreme Court of the United States

October Term, 1988

CLARK W. ROWLAND,

*Petitioner*,

vs.

ALAMEDA COUNTY PROBATION DEPARTMENT

*Respondent*.

## REVISED PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS, FIRST APPELLATE DISTRICT, DIVISION FIVE

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50 pp

## QUESTIONS PRESENTED

1. In an employment discrimination action wherein the applicant is originally denied a job for discriminatory reasons, will a subsequent un-accepted offer of a substantially similar job by the employer relieve the employer of all liability, rather than mitigate damages only?

2. In cases wherein federal causes of action are litigated in state courts, should federal law control the determination of whether the trial court's findings were sufficient to sustain the judgement?

3. If it is ultimately adjudged that Petitioner is entitled to prevail on the one cause of action tried and that he has established that Respondent has a practice of discrimination against Caucasians as a class, would it be within the trial court's discretion to order Respondent to institute an affirmative action plan requiring the recruitment and hiring of Caucasians?

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# Supreme Court of the United States

October Term, 1988

CLARK W. ROWLAND,

*Petitioner*,

vs.

ALAMEDA COUNTY PROBATION DEPARTMENT

*Respondent.*

Petitioner prays that a writ of certiorari issue to the California Court of Appeal, First Appellate District, Division Five, to review the judgment against Petitioner and in favor of Petitioner's former employer, Alameda County Probation Department.

## OPINIONS BELOW

The opinion and findings of the Trial Court are reprinted as Appendix A, pages App 1 to App. 7. The opinion of the California Court of Appeals is reprinted as Appendix B, pages App. 8 to App. 20. The latter opinion was ordered unpublished.

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## JURISDICTION

The opinion of the Court of Appeals was filed April 26, 1988. A Petition for Rehearing was filed by Petitioner and the same was denied by the Court of Appeals on May 23, 1988 (Appendix C, App. 21). A Petition for Review in the California Supreme Court was filed by Petitioner and the same was denied on July 13, 1988 (Appendix D, App. 22). Jurisdiction of this court is conferred by 28 U.S.C. Section 1257 (3).

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## STATUTES

California Code of Civil Procedure, Section 632 reads:

> [Statement of decision]
>
> In superior, municipal, and justice courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested such statement, any party may make proposals as to the content of the statement of decision.
>
> The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the

> statement of decision may be made orally on the record in the presence of the parties.

Federal Rules of Civil Procedure, Rule 52(a) reads:

> [Findings by the Court]
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

## STATEMENT OF THE CASE

This is an employment discrimination action.[1]

Petitioner, a Caucasian, was employed as a Night Group Supervisor by Respondent at the Juvenile Hall in San Leandro, California in 1978 before his layoff was precipitated by California's State Proposition Thirteen of that year. Throughout the period of Petitioner's employment, there existed large murals painted on the walls of the Juvenile Hall containing slogans such as "Black Power" and "Blacks Rule" (Trial Court Findings, App. 4; Exhibit 9) and there existed various books containing racial themes (App. 4; Exhibits 4-8 and 11). Although not the bulk of his case, Petitioner introduced such items as *some* evidence of discrimination. The trial and appellate courts discounted their probative value (App. 4 and 14, respectively).

After being layed off June 24, 1978, Petitioner received a terminal evaluation (Exhibit 14) which rated his work performance as satisfactory overall, but contained a recommendation by one Emerson Chapman (Mr. Chapman) that Petitioner not be rehired due to his "poor interactions with coworkers." Mr. Chapman was the person in charge of hiring persons into the position Petitioner occupied, Night Group Supervisor at the Juvenile Hall (App. 1). Mr. Chapman is Black (App. 7) as were all the other employees on Petitioner's shift other than he (Exhibit 32, page 6; CT 538:8-18).

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[1] Due to the unique nature of this case and the issues raised, the statement of facts is lengthier than usual.

The "poor interactions" mainly centered around Petitioner's relationship with his most immediate supervisor, one Leroy Hendrix (Mr. Hendrix). Mr. Chapman was aware that Mr. Hendrix had a reputation for not being able to get along with other coworkers (Exhibits 17 and 15, pages 1:24-2:3). Almost immediately after Petitioner began working for Respondent, Mr. Hendrix began making comments which were racial in nature (RT 45:23-28, 47-51). Shortly thereafter, Petitioner began making notes of some of the comments so as to document them (RT 47:2-7). The comments included, among others, references to basketball teams as either weak white teams or strong black teams and referring to a particular female day shift staff member as liking "black meat"; meaning that she enjoyed having sex with Black men (RT 48:11-49:13). Petitioner testified that Mr. Hendrix would look at Petitioner when making such remarks, apparently in an effort to "get his goat" (*Id.*). The trial and appellate courts discounted the probative value of the racial comments also (App. 7 and App. 9, respectively).

Eventually Mr. Hendrix's comments became intolerable to Petitioner and the latter approached the highest ranking supervisor on the night shift at that time, Maurice Seymour (Mr. Seymour), and told him of the problem with Mr. Hendrix (RT 51:14-28). Mr. Seymour called both Petitioner and Mr. Hendrix into his office for a meeting at which only the three were present (RT 948:4-949:8). Exactly what occurred during that meeting was in dispute.

Mr. Seymour testified on cross-examination that he recalled having called the meeting because of Petitioner's complaints regarding "some racial slurs or innuendoes" that

were made by Mr. Hendrix (RT 941:2-12); that he could not recall the nature of the slurs or innuendoes (RT 945:20-946:4); that *he could not recall ever investigating to determine if Mr. Hendrix had made such slurs or innuendoes* (RT 946:5-947:2); that he could not remember if he had smirked or smiled when Petitioner told him about the racial slurs or innuendoes (RT 947:28-948:2); and that he could not recall referring to Petitioner's and Mr. Hendrix's problem as a "personal problem" or saying verbatim that the two would have to resolve the problem themselves, but he just felt it had been resolved (RT 949:15-20).

On redirect, Mr. Seymour also testified that he told Petitioner and Mr. Hendrix that "it was inappropriate to discuss these types of issues [racial slurs and innuendoes]" (RT 989:1-20); that he "asked both to cease the bantering back and forth of the racial innuendoes ... and leave it alone" (*Id.*); *that he "didn't want to hear it anymore"* (*Id.*); and that he told the two that "it was unprofessional and knock it off" (*Id.*).

Petitioner, on the other hand, testified that although he could not recall all the racial remarks he told Mr. Seymour about during the meeting, that he could remember two of them: the "strong black teams/weak white teams" remarks and the "black meat" remarks (RT 51:23-52:26); that when he mentioned the "black meat" remark to Mr. Seymour that, "instead of him seeming concerned, like [he] would think a supervisor would be, he sort of laughed, sort of chuckled" (*Id.*); that Mr. Seymour told Petitioner and Mr. Hendrix that it was a *personal* problem of theirs which they, themselves, would have to resolve or *one of them would have to go* (*Id.*);

and that he had also complained to Mr. Seymour during that meeting about the underrepresentation of all races at the Juvenile Hall, except for Blacks (*Id.*). The only finding which the trial Court made regarding what occurred at the meeting was that Mr. Seymour "requested that they [Petitioner and Mr. Hendrix] resolve their *personal* differences" (emphasis added) (App. 3).

On or about the day following the meeting with Mr. Seymour and Mr. Hendrix, Petitioner contacted Mr. Seymour's supervisor, Mr. Chapman (53:2-54:7 and 939:11-940:12). During their conversation, Petitioner mentioned, among other things, Mr. Hendrix's comments and a racial atmosphere at the Juvenile Hall. Mr. Chapman responded by telling Petitioner that it was *a personal problem which he, Mr. Chapman, could not do anything about* and that Petitioner should approach Mr. Hendrix and tell him that Petitioner did not appreciate the comments (Exhibit 15, page 3; RT 53:2-54:7; and Respondent's responses to interrogatory 56 of Petitioner's first set, Exhibit 66 at pages 7 and 17).

Doubtless it was Petitioner's relationship with this one employee which formed the main, if not sole, ostensible basis for the comments on the evaluation. Before March 20, 1985, when Petitioner disclosed in his deposition that there were other coworkers with whom his relationship at times could conceivably be termed poor, Respondent had never mentioned the names of any other coworkers in that regard; neither to Petitioner in the course of years of discovery, nor to the Equal Employment Opportunity Commission during its investigation in 1978. Indeed, all of Respondents supervisors and managers who testified, stated that they could not remember

the names of anyone except Mr. Hendrix raised in that context (RT 338:1-12 and 951:26-953:26, for instance).

Respondent did not call any of Petitioner's former coworkers to testify. One of these former coworkers, and one Petitioner testified had made threats toward him and his automobile, remained employed by Respondent at the time of trial (RT 475:14-18) and, according to Respondent's former Personnel Manager, Naomi Burns, records of all other employees and presumably their addresses were ordinarily kept for at least ten years (RT 885:6-19). When Petitioner attempted to obtain, through discovery, the addresses of two black nurses who worked the night shifts in close proximity to Petitioner and his coworkers at Juvenile Hall in 1978, Respondent's response was that it had no record of them having worked there (Respondent's response to interrogatory 41 of Petitioner's second set, Exhibit 66 pages 31-32 and 43). It is undisputed that Petitioner and the nurses got along well (RT 110:25-112:13 and 482:25-484:13). Nor did Respondent call another employee with whom Petitioner had worked close to, Reverend Billy Sheard, although he had retired only shortly before trial (RT 950:21-951:4). Even the very person who made the initial no-rehire decision and whose motives were primarily in issue, Mr. Chapman, was not called as a witness and no *evidence* was presented to explain his absence.

Upon the advice of one Lonnie Sweeney[2], the Supervisor who filled out the evaluation before Mr. Chapman added his comments, Petitioner appealed to the Director of Juvenile Hall, Ken Moresi (Mr. Moresi). The two met August 10, 1978 and discussed, among other things, the evaluation and no-rehire decision. During the meeting, Petitioner suggested to Mr. Moresi that he felt he was the victim of race discrimination and that he would be willing to settle his claim if he were re-employed by Respondent as a Night Group Supervisor at Juvenile Hall. In order to make his re-employment more palatable, he suggested that he be rehired at a different institution during a cooling off period, but that he wanted to return to the Juvenile Hall within six months to one year (RT 139:1-16). Petitioner also told Mr. Moresi that he wanted retroactive seniority from the date that he would have been rehired had he, like his coworkers, been rehired in order of seniority (RT 138:16-28). At the meeting, Mr. Moresi neither accepted, nor rejected, the terms of Petitioner's proposed settlement.

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[2] Mr. Sweeney was the brother of Wilmont Sweeney, the current Presiding Judge of the Juvenile Division of the Alameda County Superior Court, a fact known to the Court and both parties at trial (RT 133:19-24).

After conferring with other management personnel, Mr. Moresi wrote Petitioner and in that letter (Exhibit 19) dated August 17, 1978, he notified Petitioner that the no-rehire decision was rescinded; that he would be *considered*[3] along with other available candidates for future jobs; and that the other institutions would be notified of Petitioner's availability.

On or about August 30, 1978, Jack Sanders (Mr. Sanders) who was the Director of a nearby institution, Chabot Ranch, attempted to contact Petitioner by telephone to invite him to interview for a Night Group Supervisor position at Chabot Ranch (RT 145:16-24). Petitioner testified that he returned Mr. Sanders' call and told him he wanted to clarify some things with Mr. Moresi before accepting the interview (RT 146:3-9).

Subsequently, Petitioner called Mr. Moresi and was told by the same that, among other things, there was no guarantee he would be rehired and that, even if he were rehired, there was no guarantee that he would ever be assigned to the Juvenile Hall again (RT 146:10-17), whereupon Petitioner stated that he would not settle his claim under those circumstances (*Id.*).

After exhausting the Respondent's appeal process, Petitioner filed a complaint with the Equal Employment Opportunity Commission and sought an attorney. Because he

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[3] Although disputed below, Petitioner will concede for the purposes of proceedings in this Court that a firm job offer was made and that the job offered was substantially similar to the job he had previously held.

could not afford to advance fees and because of a perception of local judicial bias against "reverse discrimination" cases, Petitioner could not locate an attorney who would take the case (CT 539:3-18 and 654:5-15). In 1979 Petitioner entered law school and on January 25, 1980 filed this action.

Petitioner graduated from law school in May 1983 and began litigation in earnest at that time. The case finally came to trial on July 22, 1985. The trial was before the Court without jury and the trial judge ordered post trial briefing in lieu of closing argument (CT 758-909).

Judgement was entered against Petitioner on December 20, 1985 (CT 934).

The issues raised herein were raised in a timely fashion in the California courts.

The first question presented herein was raised by Petitioner in the Court of Appeal in Plaintiff and Appellant's Revised Opening Brief at pages 42 and 44. A portion of that brief reads: "At the outset, one should bear in mind that the events which occurred subsequent to the initial decision not to rehire Mr. Rowland does not affect liability *vel non* for such unequal treatment initially (citation omitted)" (*Id.* at 42). The Court of Appeal concluded that since the no-rehire decision was eventually rescinded, Petitioner was not denied a job (App. 12).

The second question presented herein was raised by Petitioner in the Court of Appeals in Appellant's Reply Brief at pages 11-12. A portion of that brief reads: "The Probation Department also contends that California law should be applied regarding the issues of the sufficiency of the findings and the standard of review (citations omitted)" (*Id.*, at 11).

Without mentioning federal standards, the Court of Appeal applied California standards in determining that the findings were sufficient to sustain the judgment (App. 15-16).

The third question presented was raised in the Trial Court by Petitioner in open court (RT 11 and 15:4-16:2). Portion of the Reporter's Transcript reads in part: "The defense position is that....the only relief remaining...is damages... The plaintiff's position is that....the motion for summary judgment...does not limit him to relief seeking damages only...(Trial Judge speaking)" (*Id.*, at 11). The Trial Court later stated that class-wide relief was not available (RT 864:9-865:6), although Petitioner had alleged a pattern and practice of discrimination in his first cause of action (CT 295:13) and prayed for such injunctive relief (CT 305:6).

## ARGUMENT

### I

### THE CALIFORNIA COURT OF APPEAL'S OPINION CREATES A UNIQUE INTERPRETATION OF LAW WHICH DIRECTLY CONFLICTS WITH FEDERAL CASE LAW.

The Court of Appeal affirmed the judgment against Petitioner on the first cause of action and concluded, for the same reasons, that the Trial Court's erroneous dismissal of the second and fifth causes of action[4] was harmless error.

The Court of Appeal reasoned that because Petitioner had refused to interview for the job at the other institution, that he had not met the second prong of the prima facie case test set forth in *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) and also that no adverse action was taken against him because the no-rehire decision was subsequently rescinded (App. 12) and thus, even though coworkers with less seniority were rehired and placed back on the payroll before him, he was not harmed, even if

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[4] The first complaint (CT1) alleged that Petitioner was denied rehire because of his race. The second and fifth causes of action of the Second Amended Complaint additionally alleges, respectively, that the denial of re-employment was substantially due to retaliation against Petitioner for having exercised his right to free speech in violation of 42 USC Section 1983 (CT 295-6) and for having complained about racial discrimination against him, Caucasians in general and non-black minorities as well, in violation of 42 Section 1981 (CT 298).

discrimination had been involved (*Id.*). Such reasoning conflicts with federal law and defies notions of common sense.

As this court noted in *Ford Motor Company v. Equal Employment Opportunity Commission* 458 U.S. 219, 232, footnote 18, 73 L.Ed.2d 721, 102 S.Ct. 3057 (1982):

> The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim against the employer, in whole or in part. Thus, an applicant or discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised (citation omitted).

In accord is *Metrocare v. Washington Metropolitan Area Transit Authority*, 679 F.2d 922, 927 (D.C.C.A. 1982) (the fact that the plaintiff was ultimately promoted and received all raises and experienced no unfair treatment does not prevent him from recovering if he suffered race discrimination at one point).

The Court of Appeal's reasoning would allow employers who discriminate to defeat a victim's claim simply by offering the victim a job if and when the victim complains about the job previously denied. Such an offer, of course, mitigates damages, *Ford Motor Company v. Equal Employment Opportunity Commission*, *supra*, but to allow it to defeat a claim entirely would be to allow it to defeat employment discrimination laws.

The Court of Appeal's related conclusion that, even if Petitioner had been the victim of race discrimination, Petitioner was not harmed, is also erroneous. Petitioner was,

and still is, stigmatized by the evaluation[5] and no-rehire decision; he had to appeal to the Juvenile Hall Director to get the no-rehire decision rescinded; and he would have been on the payroll earning money and accruing seniority sooner, had he been rehired when coworkers with less seniority were rehired.[6]

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[5] As if the evaluation in 1978 was not stigmatizing enough, an effort by Petitioner to explain at trial that whatever poor interactions did occur, occurred with his younger, less mature coworkers (RT 951:9-13) has been transformed by the Court of Appeal into a finding that Petitioner told the Trial Court that he "...generally had trouble getting along with younger Black men" (App. 14).

[6] The Court of Appeal put emphasis on the fact that "[o]f the 13 [Night Group Supervisors] who had not yet been rehired, Rowland was the one with the *least* seniority (Court's emphasis)" (App. 13). The Court's analysis is misleading because the Court combined the layed off employees from every institution to arrive at its figure. But each institution was autonomous. Once hired at one institution by that institution's management, the employee works only at that institution (RT 401:17-21). The data (Exhibit 35, Attachment 10) demonstrated this. Also, some jobs were segregated by gender (404:21-405:17), thereby, further limiting the positions any given Night Group Supervisor might be recalled to. Once one takes into account the fact that Ronald Hayes and John Tuefeson, although listed as working at the Juvenile Hall, actually worked at two other institutions, Las Vistas and Senior Camp, respectively (see their job performance evaluations, Exhibit 42 and 43), the data shows that, except for Mary Schmidt, every Night Group Supervisor was rehired to the same institution into the same male or female position and in exact order of seniority. Finally, the Court of Appeal's analysis fails to take into account the numerous other reasons why management may not have wanted to rehire some other Night Group Supervisors. The Court of Appeal should have focused only on those who were rehired to the position Petitioner occupied, Male Night Group Supervisor at the Juvenile Hall. Compared to those rehired to that position, Petitioner was the *most* senior (Exhibit 35, Attachment 10, *supra*).

As this court has cautioned the lower courts on numerous occasions, the *McDonnell Douglas* test is not applicable to every situation and the prima facie case may vary, depending upon the facts of each case.[7] *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 575-577, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978).

Moreover, once tried, it was error to focus on the prima facie case, rather than the ultimate issue of discrimination *vel non*. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-715, 75 L.Ed.2d 403 103 S.Ct. 1478 (1983).

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[7] The statistics, alone, with standard differences for Caucasians as high as -18.33, were strong enough to establish a prima facie case, as explained in Plaintiff And Appellant's Revised Opening Brief, pages 16-17. Curiously, the Court of Appeal did not address the issue.

II

## FEDERAL STANDARDS SHOULD HAVE BEEN APPLIED BY THE CALIFORNIA COURT OF APPEAL WHEN IT REVIEWED THE SUFFICIENCY OF THE TRIAL COURT'S FINDINGS TO SUSTAIN THE JUDGMENT.

### A

### The Findings Were Insufficient Under Federal Standards.

Despite Petitioner having timely raised the issue in the Court of Appeal (Statement Of The Case, *supra*, at 12-13), the California Court of Appeal failed to address whether federal standards (Federal Rules of Civil Procedure, Rule 52) for reviewing the sufficiency of the trial Court's findings applied. Without mentioning the federal standards, the Court applied California's rules (California Code of Civil Procedure, Section 632) which the Court ruled usually requires findings only on ultimate facts. In doing so, it concluded that findings on Petitioner's relative job qualifications and the statistical data were not "principal controverted issues" within the meaning of C.C.C.P. Section 632 requiring findings. Although it recognized that the principal issue was whether the Respondent had refused to rehire Petitioner for racial motivations, it concluded that the qualifications and statistical evidence of racial imbalances in the work force "were merely

pieces of evidence which the court *could* have considered on the issue of motivation (emphasis added)" (App. 15).

Qualifications of a claimant relative to other employees hired (or rehired) is, of course, relevant evidence, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981); *Bishop v. District of Columbia*, 788 F.2d 781, 786-7 (C.A.D.C. 1986), and statistics is a major method of proving racial discrimination, having much probative value. *Diaz v. American Telephone and Telegraph*, 752 F.2d 1356, 1362-1363 (9th Cir. 1985); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1342-1343 (9th Cir 1981). These are not merely pieces of evidence which a court *could* consider; a court *must* consider them.

Under the federal standards, the findings must be reasonably specific so as to assure appellate courts that the trial court took into consideration all the evidence it should have considered and that it understood the legal principals germane to disposition of the case, *Sumner v. San Diego Urban League, Inc.*, 681 F.2d 1140 (9th Cir. 1982).

In this case the Trial Court's findings (App. 1-7) failed to consider Petitioner's qualifications relative to his less senior coworkers who were rehired. Indeed, the Court could not have made such a comparison because the Trial Court, in an error invited by Respondent's counsel's objection, precluded Petitioner from soliciting testimonial evidence of his former coworkers' job performances (RT 679:7-681:22).

The Trial Court's findings intentionally excluded any reference to the statistical data as well. Although the Trial Court made a near wholesale adoption of the Respondent's

proposed findings, it made a rare deviation when it omitted the portion of Respondent's proposed findings pertaining to the statistical data (Defendant's Proposed Findings, CT 927). The findings simply do not give any assurance that the trial Court considered the strong statistical evidence, nor the evidence of Petitioner's qualifications, despite the strength of such evidence having been argued in detail in Petitioner's post-trial briefs (Plaintiff's Post-Trial Briefs, CT 769-772, 782-785, 886-889, and 892-893).

There is another reason why the findings were insufficient under federal law. Although this court has apparently not addressed the issue yet, the few lower courts which have addressed the issue unanimously conclude that, regardless of the motivations of the ultimate decision maker, an employer cannot sit idly by and allow harassment of an employee and then use the employee's diminished work performance as an excuse to fire (or deny rehire) when such diminished work performance would not have occurred but for the harassment. See for instance, *DeGrace v. Rumsfeld*, 614 F2d. 796, 803-804 (1st Cir. 1980) and *Weiss v. United States*, 595 F. Supp. 1050, 1057 (E.D.Va. 1984). The Trial Court should have determined whether Petitioner's "poor interactions" with coworkers were the result of racial harassment of him which management failed to take reasonable steps to prevent. Although raised in a post trial brief (CT 888-889), the Trial Court failed to address the issue. As with the Trial Court's failure to find on the issues of Petitioner's job qualifications relative to his coworkers and the racial disparities in the work force, remand for further

findings, in the least[8], was indicated if, as Petitioner contends, *infra*, federal standards should have been applied.

## B

## Federal Standards Should Have Been Applied

It is often said that when federal based causes of action are litigated in state courts, state courts must apply federal substantive law, but may apply their own procedural law. There is no doubt, though, that state rules, even if characterized as procedural, cannot be applied if the affect is to frustrate or defeat federal law. *Brown v. Western Railway of Alabama*, 338 U.S. 294, 298-299, 94 L.Ed. 100, 70 S.Ct. 105 (1949). Most California courts, of course, recognize and respect this principle of federalism. *Williams v. Horvath* (1976) 16 Cal.3d 834, 841, 129 Cal.Rptr. 453, 548 P.2d 1125. See also *Morse v. Southern Pacific Transportation Company* (1976) 63 C.A.3d 128, 133 Cal.Rptr. 577, (state rule of evidence allowing admission of evidence of collateral benefits received by employee held not applicable to Federal Employers' Liability Act (FELA)); *Davee v. Southern Pacific Company* (1952) 58 C.2d 577, 576, 25 Cal.Rptr. 556, 375 P2d 436 (the kind or amount of evidence required to establish a

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[8] Below, Petitioner strenuously contended that the evidence was so overwhelming in his favor and the Trial Court's finding so replete with obvious errors that the judgment was clearly erroneous and entitled Petitioner to judgment as a matter of law (Plaintiff and Appellant's Revised Opening Brief, pages 22-45).

violation of the FELA is not subject to the control of the states); *Butchers Union v. Farmers Markets* (1977) 67 C.A.3d 905, 136 Cal.Rptr. 894 (federal standards apply in determining whether a party seeking arbitration has properly complied with the arbitration procedure where such action could have been brought under the Labor-Management Relations Act); *Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 195 Cal.Rptr. 268 (federal rules of pleading applied to determine the sufficiency of complaint under 42 U.S.C. Section 1983 so as to avoid frustrating federal civil rights statute and to provide needed national uniformity); and *Kreutzer v. County of San Diego* (1984) 153 Cal.App. 3d 62, 200 Cal.Rptr. 322 (without discussion of federal-state law conflict, federal standards applied to determine whether trial court abused discretion by denying attorney fees under 42 U.S.C. Section 1988).

Many federal interests favor applying federal standards while the states' interests in applying their rules are almost nonexistent. Uniformity in application and interpretation of federal laws would be lost and assurances that federal laws are being adequately enforced in the state courts would be diminished. The burdens placed on lawyers and judges when attempting to interpret case law involving numerous different standards of review would be onerous and the ability of trial courts to avoid explaining the basis of their judgments would effectively hamper adequate appellate review, thereby having the potential for impermissibly frustrating federal law. Applying federal standards on the other hand would promote the federal interest in uniformity and the interest in having firmly defined, easily applied rules.

See *Wilson v. Garcia*, 471 U.S. 261, 270, 85 L.Ed.2d 254, 105 S Ct. 1938 (1985).

Further, allowing states to determine whether the evidence and findings are adequate to establish a violation of federal rights would put this Court in the awkward position of having to second guess the state courts' interpretations and applications of their own rules lest this Court abandon its duty to supervise and review lower courts' decisions involving federal rights.

Moreover, in civil rights cases such as this, there are other factors favoring application of federal standards. The purposes of such statutes are compensation of persons whose civil rights have been violated and deterring abuse of state power. *Burnett v. Grattan*, 468 U.S. 42, 32, 82 L.Ed.2d 36, 104 S.Ct. 2924 (1984). Although society has made significant strides in recent years in the area of civil rights, there is much work yet to be done. Blacks and other minorities in rural areas still face judicial reluctance to enforce their civil rights and in recent years, with the shift in political power in the large cities, Caucasians often face the same judicial reluctance in urban areas. Consequently, the area of civil rights law is the area of law least appropriate for deference to the states' determinations of when violations of federal law have occurred.

Finally, whatever interests the states have for applying their standards of review to state created causes of action, the only interest they could have for applying their standards of review to federal created causes of action is that their appellate courts not have to learn and apply two forums' sets of rules -- something federal courts do routinely in diversity

already done at some point in their careers. This small interest of the states, then, is far outweighed by the strong aforementioned federal interests.

## III

## IF PETITIONER ULTIMATELY PREVAILS ON THE FIRST CAUSE OF ACTION AND DEMONSTRATES THAT RESPONDENT HAS A PRACTICE OF DISCRIMINATING AGAINST CAUCASIANS AS A CLASS, THE TRIAL COURT, IN ITS DISCRETION, SHOULD BE ALLOWED TO REQUIRE RESPONDENT TO INSTITUTE AN AFFIRMATIVE ACTION PLAN REQUIRING THE RECRUITMENT AND HIRING OF CAUCASIANS.

Although this is not an issue which the Trial Court ruled on because the judgment was in Respondent's favor, the trial judge clearly indicated that he believed that class wide injunctive relief was not available to Petitioner even if he had prevailed (RT 15:4-16:2 and 864:9-865:6).

In light of the trial judge's ruling and the need to avoid another long and costly appeal, it would be helpful to resolve the question at this stage of the proceedings if remand for further findings on the issue of liability were required. Also, addressing the issue would be indicated if, as Petitioner contends, the evidence of class wide discrimination combined with Respondent's rebuttal entitles Petitioner to judgment as a matter of law on the issue of class wide discrimination.

The right and power of courts to impose class wide injunctive relief in an individual non-class action employment discrimination case is not well established and is apparently a question of first impression to this Court. But all lower court decisions known to Petitioner which have addressed the issue have answered the question in the affirmative. See, for instance, *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1136 (11th Cir. 1984); *Meyer v. Brown & Root Construction Company*, 661 F.2d 369, 373-374 (5th Cir. 1981); and *Gregory v. Litton Systems, Inc.*, 472 F.2d 631, 633 (9th Cir. 1972).

Whether members of the majority race can be the beneficiaries of such affirmative action in those rare cases where there exists a pattern and practice of discrimination against them is apparently a question of first impression also. Yet, if majority race members are entitled to the equal protection of our civil rights laws as this Court has apparently declared, *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 49 L.Ed.2d 493, 96 S.Ct. 2574 (1976), there are no good reasons why, in those rare situations where it is appropriate, such remedy should not be available to members of the majority race also.

## IV.

## SUMMARY AND CONCLUSION

The California Court of Appeal's decision conflicts with federal law and frustrates federal anti-discrimination laws in so far as it allows an employer to escape liability by simply

offering a job to a victim of discrimination and by allowing state courts to prevent adequate review of their judgments in cases involving federal based causes of action.

Moreover, whether federal standards should apply in determining the sufficiency of state trial courts' findings relative to federal based causes of action, whether class wide affirmative relief is available in an individual non-class action, and whether Caucasians can be the beneficiaries of affirmative action programs in those rare cases where on employer has a pattern and practice of discriminating against Caucasians are important questions of federal law which should be settled by this Court.

Finally, a review of the record discloses that the California Courts, among other things, have ignored precedent, misconstrued precedent, and avoided addressing issues and theories which could be dispositive. Consequently they have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

DATED: October 28, 1988

Respectfully submitted,

Clark W. Rowland
P. O. Box 392
Lafayette, CA 94549
(209) 466-9512

Petitioner, Pro Se

APPENDIX A

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CLARK W. ROWLAND
Plaintiff,

vs. No. 529464-0
STATEMENT OF DECISION

ALAMEDA COUNTY PROBATION DEPARTMENT, et, al.,
Defendants.

Plaintiff Clark W. Rowland was hired on or about January 15, 1978, by the Alameda County Probation Department to work as a Night Group Supervisor at its Juvenile Hall facility in San Leandro and began working on or about January 20, 1978. One of Mr. Rowland's supervisors was Senior Counselor Maurice Seymour. Beginning approximately March 19, 1978, Mr. Lonnie Sweeney became the senior counselor regularly supervising Plaintiff. The senior counselors were supervised by Mr. Emerson Chapman, who was responsible for hiring Night Group Supervisors, including Plaintiff. Plaintiff is Caucasian; Mr. Seymour, Mr. Sweeney and Mr. Chapman are black. The Director of

Juvenile Hall, to whom Mr. Chapman reported was Mr. Ken Moresi, who is Caucasian. Mr. Moresi's supervisor was Mr. Van Reimer, the Director of Juvenile Institutions, who is also Caucasian. Mr. Sweeney was no longer living at the time of the trial.

Plaintiff, as a Night Group Supervisor, was a provisional appointee under Alameda County Civil Service Rule 1720. Thus, he was not considered to have tenure. With the exception of employees who had obtained tenure in another classification, all of the Night Group Supervisors employed by the Probation Department were provisional appointees. The position of Night Group Supervisor was not a position requiring any special skills. It was a low level job and Night Group Supervisors did not supervise other employees.

Plaintiff had been a detainee in the Juvenile Hall as a youth. Between the ages of nine and eighteen, he spent approximately three years in the facility, usually awaiting placement in foster homes.

One of the Plaintiff's co-workers was Leroy Hendrix, who is black. On occasion, particularly during the first two months of Plaintiff's employment, Plaintiff and Mr. Hendrix worked in the same area of Juvenile Hall, known as the control room. Within the first month of his employment, Plaintiff claimed that Mr. Hendrix made comments to him that a newspaper story about Floyd Patterson's daughter being arrested would not have appeared in the paper had Patterson not been black, and that his basketball team's next opponent was a weak white team. Plaintiff took offense at these

remarks and complained to Mr. Seymour about some of them. About January 27, 1978, Plaintiff began keeping a written record of what he considered to be racial slurs. Mr. Seymour called Plaintiff and Mr. Hendrix in for a meeting in either late February or early March, 1978, at which he requested that they resolve their personal differences. Thereafter, Plaintiff never again complained to Mr. Seymour or Mr. Sweeney concerning alleged racial harassment.

Plaintiff complained to Mr. Sweeney and Mr. Chapman of his work assignments. he complained that a newly hired Night Group Supervisor, Henry Randolph, was assigned to work full time before he was. Plaintiff had, in fact, worked full time during many weeks before Mr. Randolph was hired, but had not been officially assigned a full-time position. Shortly after his complaint, Plaintiff was made full time. Plaintiff also complained that because of his seniority, he should have been given a better assignment, to a living "unit." The Juvenile Hall control log, which was contemporaneously maintained, showed that Plaintiff did receive unit assignments more frequently than the two Night Group Supervisors who were hired after him, Henry Randolph and Thomas Mason.

Plaintiff testified that he had conflicts with co-workers Hendrix, Evens, Berry and Randolph, all of whom are black, and that he did not get along well with Mr. Chapman. He characterized his problems as being with the younger black males, as opposed to more mature black males.

Plaintiff made secret tape-recordings of telephone conversations he had with Mr. Chapman in April, 1978, and with Mr. Chapman and Mr. Sweeney in August, 1978. The tape recordings and the transcripts of these conversations were received in evidence.

During the period of Plaintiff's employment, there were murals on the Juvenile Hall's walls which contained slogans such as "Black Power" and "Blacks Rule." Management purchased books for the detainees to read, some of which contained racial themes. These books were not without literary value.

Plaintiff was one of 18 Night Group Supervisors whose employment terminated on June 24, 1978, as a result of Proposition 13 mandated layoffs. The only Night Group Supervisors who were not laid off were persons who had received tenure in another classification. Provisional appointees, such as Plaintiff, did not have the right to be rehired according to seniority. Plaintiff never attempted to verify with the Probation Department's personnel office whether he, as a provisional appointee, had preferential rehire rights.

The rehiring of Night Group Supervisors was not according to seniority. At least four Night Group Supervisors with longer service than Plaintiff, who had worked on the boys' side at Juvenile Hall along with him, were not rehired: Margie Washington, hired September 14, 1975; Jimmy Colden, hired August 29, 1976; Cornelius Berry, hired July

24, 1977; and Arthur Hall, hired August 7, 1977. All are black.

Plaintiff and several other Night Group Supervisors received terminal evaluations. Mr. Sweeney and Mr. Chapman prepared Plaintiff's which was reviewed by the Director of Juvenile Hall, Ken Moresi. Mr. Sweeney and Mr. Chapman recommended that Plaintiff be ineligible for rehire on the basis of their interactions with him and his relationships with co-workers. Mr. Moresi reviewed and accepted this recommendation, and these were the reasons Plaintiff was not initially, offered re-employment. Similarly, Mr. Sweeney and Mr. Chapman recommended against rehiring Mr. Berry, in part because of his interactions with co-workers. Mr. Moresi reviewed and accepted this recommendation.

After Plaintiff received his terminal evaluation, recommending that he be ineligible for rehire, he made the telephone calls to Mr. Sweeney and Mr. Chapman which he secretly recorded. Mr. Chapman told him that in his opinion, Plaintiff was not suitable for re-employment because he made issues out of things that were not issues and because it was difficult to explain things to him. Mr. Chapman also told him that Plaintiff had no right to rehire, and that rehire was not based on seniority.

Plaintiff also complained to Mr. Moresi about the failure to rehire him. Mr. Moresi had already reviewed the recommendation with Mr. Chapman, and talked to Mr. Sweeney and Mr. Seymour about it. He also discussed the

subject with his supervisor, Mr. Van Reimer,the Director of Juvenile Institutions. Mr. Moresi and Mr. Reimer decided that Plaintiff would be eligible for rehire, but not at Juvenile Hall, and notified the Director of Chabot Ranch, Jack Sanders, of this fact. Mr. Sanders called Plaintiff to arrange an interview for a newly vacant Night Group Supervisor position at Chabot Ranch. Plaintiff, however, declined to interview for the Night Group Supervisor position because Mr. Reimer would not meet the special conditions Plaintiff placed on re-employment, such as retroactive seniority, guaranteed reassignment to Juvenile Hall and racial hiring quotas. Mr. Sanders testified that he had no candidates under consideration other than Plaintiff when he called Plaintiff for an interview. The Night Group Supervisor position at Chabot Ranch was substantially similar to the job Plaintiff had held at Juvenile Hall. Had Plaintiff been offered and accepted the position in early September, 1978, he would have had longer County service than Mr. Randolph or Mr. Mason, who had earlier been rehired.

Plaintiff claims that the failure to rehire him as a Night Group Supervisor was due to his Caucasian race.

Plaintiff has not proved intentional, purposeful discrimination, and has not proved that Defendant was more likely than not motivated by discriminatory animus in refusing to rehire him. Plaintiff has not proved that Alameda County treated him less favorably than others because of race.

Plaintiff failed to sustain his burden of proof that more likely than not, the refusal to rehire him was due to his race.

His conflicts with co-workers and supervisors were legitimate, nondis-criminatory reasons for not rehiring him. The comments which Plaintiff attributed to co-worker Leroy Hendrix did not constitute harassment or discrimination.

Plaintiff's actions in commencing to keep a written record of what he interpreted as racial slurs, within approximately one week after beginning to work for Defendant, and in secretly taping phone conversations with employees of Defendant, evidence an attitude which would justify an employer in concluding that Plaintiff was not a suitable candidate for rehire as a Night Group Supervisor.

Plaintiff's placement of special terms and conditions on his re-employment also provided Defendant with a legitimate, nondiscriminatory reason for refusing to rehire him. Defendant was not required to provide Plaintiff with retroactive seniority, the assignment of his choice, nor to implement his suggested quota system.

Defendant is the prevailing party.

Defendant is entitled to judgment that Plaintiff take nothing by his Second Amended Complaint.

DATED: DECEMBER 20, 1985

John S. Cooper
Judge of the Superior Court

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 5

CLARK W. ROWLAND
Plaintiff and Appellant,

vs.

ALAMEDA COUNTY PROBATION DEPARTMENT,
Defendant and Appellant.

A034490
Alameda County
Super.Ct.No. 529464-0

Clark W. Rowland sued Alameda County for racial discrimination in working conditions and for refusal to rehire Rowland after a layoff. On the defendant's motion for summary judgement, 13 of the 14 causes of action alleged in Rowland's second amended complaint were found to be barred by statutes of limitations. After trial to the court on the remaining claim, judgement was entered for the defendant. We affirm.

Rowland was employed by the county for several months in 1978 at the probation department's juvenile hall. After a general layoff occasioned by budget cuts, he was not rehired.

In 1980, he alleged in a single count complaint that the failure to rehire was racially motivated and therefore was in violation of the California Fair Employment Practices Act. (Former Lab. Code, Section 1410 et seq., now Cal. Fair Employment & Housing Act [Gov. Code, Section 12900 et seq.].) Rowland's second amended complaint, filed in 1984, alleged discrimination both in the failure to rehire and in working conditions during his employment. All but the first count were dismissed on summary judgement.

The first cause of action was tried in july 1985. Viewed in the light most favorable to the judgement, the evidence was as follows. In January 1978, Rowland was hired as a part-time night group supervisor (NGS) at juvenile hall. The NGS's worked from 11 p.m. to 7 a.m. and were responsible for keeping watch over the residence areas of the Hall while detainees slept, letting the detainees out to use the bathroom and obtaining medical care if needed. NGS was a "provisional" position in the county's civil service scheme without the tenure or seniority rights of a regular civil service position.

One of Rowland's fellow NGS's was Leroy Hendrix. Soon after Rowland began work, Hendrix made several remarks which Rowland characterized as racial slurs (Hendrix is Black and Rowland is White). According to Rowland, another Black NGS, Evans, made thinly veiled physical threats against him.

In February or March, Rowland complained about Hendrix to his immediate supervisor, Maurice Seymour.

Rowland also complained to Seymour about the racial composition of the juvenile hall staff, which he believed to be too heavily Black. Seymour told Rowland and Hendrix that the racial antagonism between them was a personal problem which they should resolve themselves. Rowland was offended by various murals, posters and books at juvenile hall dealing with racial themes. A mural contained slogans such as "Black Power" and "Blacks Rule," and the hall library contained volumes which Rowland viewed as racially offensive. He was also offended by the playing of largely Black music on the hall radio system. Rowland had frequent political discussions on racial topics with his co-workers, but his ideas were not well received by his Black co-workers.

On June 24, Rowland, along with 17 other NGS's, was laid off. On August 1, he received a terminal job performance evaluation. While his performance was rated satisfactory in most categories, his supervisors noted that "his interaction with co-workers was generally poor," and they recommended that he not be considered for rehiring. Kenneth Moresi, director of juvenile hall, concurred. On August 10, Rowland met with Moresi to register his disagreement with the assessment. Rowland argued that his difficulty with Hendrix stemmed from Hendrix's racial attitudes. He told Moresi he wanted to return to juvenile hall but wanted to be assigned to "unit" positions where he would not have to work with Hendrix. He wanted "retroactive seniority" over two other NGS's who had already been rehired. He also said he

was willing to work for a period of time at another institution in the system to give all parties a chance to cool off.

As a result, Moresi reconsidered and on August 17, rescinded the no-rehire decision. Believing, however, that it would be better for Rowland to work at a facility other than juvenile hall, he forwarded Rowland's name to the directors of two other department facilities with the request that he be considered for any openings. In late August a NGS position opened at the Chabot Ranch, a facility near to juvenile hall. The Chabot director called Rowland to arrange an interview. On August 30, before calling the Chabot director back, Rowland called Moresi to discuss the offer. He wanted a guaranty that he would be returned to juvenile hall in six months to a year with seniority superior to any NGS originally hired after him. Moresi said he could not meet these demands, and Rowland declined to interview for the Chabot position. In a September letter to the department's director of institutions, Rowland also demanded that the department eliminate books, posters and music he found racially offensive and ensure racial balance in the staff.

I

Rowland's first cause of action was brought under United States Code section 1981, which guarantees to all the same right to make contracts "as is enjoyed by white citizens." Despite the statute's language, White plaintiffs may bring claims of intentional racial discrimination in employment under section 1981. (*McDonald v. Santa Fe Trail Transp.*

*Co.* (1976) 427 U.S. 273, 286-287.) The nature and order of proof in a section 1981 action is generally the same as that followed in a "disparate treatment" claim brought under title VII of the 1964 Civil Rights Act (42 U.S.C., Section 2000e et seq.). (*Gay v. Waiters' and Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 537-539.)

In an intentional discrimination suit, the plaintiff bears the overall burden of persuasion on the issue of whether the employer's action was motivated by discrimination. (*Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253.) If the plaintiff establishes a prima facie case the burden of production shifts, requiring the defendant to articulate a legitimate nondiscriminatory motivation for the adverse action. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802.) The plaintiff can rebut that asserted reason, showing that it was pretextual or presenting direct evidence of discriminatory intent. (*Id.*, at p. 804.)

Rowland failed to make out a prima facie case of intentional discrimination for the simple reason that he never showed that any adverse action was taken against him. His layoff along with most other NGS's, he concedes, was for nondiscriminatory reasons. His suit was founded on the claim that the county refused to rehire him because of his race. Yet the evidence showed that the no-rehire decision was rescinded soon after being made. Rowland was invited to interview for an open NGS position, but declined to do so. In the framework of the *McDonnell Douglas* prima facie case,

Rowland was unable to prove the second element, that he applied for the position.

The NGS position at Chabot Ranch was substantially the same as the one from which Rowland was laid off. Chabot Ranch is located near to juvenile hall, and the NGS's job there involves the same duties. While Rowland was apparently under the impression that the Chabot Ranch job left insufficient uninterrupted time for study, the testimony of the Chabot Ranch director did not support that assumption. The director also testified that he had no other candidates for the position and that he intended to offer the job to Rowland if he thought Rowland acceptable after the interview.

Nor did the timing of the invitation disadvantage the plaintiff. Rowland claims that on the basis of seniority he should have been rehired, or considered for rehiring, into a vacant position earlier than he was. At the time of the invitation to interview at Chabot, however, only five of the eighteen laid-off NGS's had been recalled. Of the 13 who had not yet been rehired, Rowland was the one with the least seniority. It is true that two NGS's with less seniority than Rowland were rehired before he was invited to interview at Chabot. Had Rowland begun work at Chabot in early September, however, he would still have had more seniority than either of those two men, thus keeping whatever work privileges were granted NGS's on the basis of seniority. Thus, Rowland's demand for "retroactive seniority" before he would accept the Chabot position was unnecessary, and Moresi's refusal to meet it was not adverse to Rowland

Rowland also demanded that the Chabot offer include a guaranteed return to juvenile hall in a year or less. Yet Rowland had himself suggested that for a time he work elsewhere to avoid friction with Hendrix.

Even if the Chabot invitation can be seen as a decision to deprive Rowland of his preferred work place, it was a reasonable nondiscriminatory response to the personal conflicts he had experienced at juvenile hall. Rowland correctly points out that when an employee's performance suffers because of racial harassment from coworkers the employer cannot use the lowered performance as a pretext to discharge or otherwise punish the worker. (*Weiss v United States* (E.D. Va. 1984) 595 F.Supp. 1050, 1057.) But the employer may, indeed must, take all reasonable measures to prevent recurrence of the harassment, and if despite these measures the employee's performance declines below acceptable standards he is subject to discharge or transfer. (*DeGrace v. Rumsfeld* (1st Cir. 1980) 614 F.2d 796, 804.) Moresi was not unreasonable in deciding that the best way to prevent continued racial friction was for Rowland to work outside juvenile hall. Rowland testified that he had conflicts with four Black employees, including one supervisor, Chapman, and told the court that he generally had trouble getting along with younger Black men. Some of the considerations of which he complained, especially the library books and the playing of particular radio stations, constituted a racially hostile atmosphere only in his imagination. It was reasonable to conclude that racial friction would continue as

long as Rowland remained at juvenile hall. The Chabot vacancy gave Moresi an opportunity to prevent the recurring friction.

But even if we assume the presence of racial animus, Rowland cannot establish a discriminatory refusal to rehire when there was no refusal to rehire. Rowland's proof fails at a level even more basic than the *McDonnell Douglas* prima facie case. Rowland has not shown that he was harmed by any adverse employment decisions which might have been influenced by any prejudice.

Nor did the court err in failing to make express findings on plaintiff's statistical evidence or his relative job qualifications. Plaintiff requested that the statement of decision include findings on whether he had established that the county maintained a "custom or practice of discrimination against Caucasians or any other races" and on whether he was better qualified than NGS's who were rehired. These questions, however, were not "principal controverted issues," within the meaning of Code of Civil Procedure section 632, requiring explanation in the statement of decision on request. The principal issues at trial were whether the county had refused to rehire Rowland after the layoff, and, if so, whether the refusal was motivated by racial discrimination. Statistical evidence of racial imbalance in the work force and Rowland's alleged superior qualifications were merely pieces of evidence which the court could have considered on the issue of motivation. Section 632 of the Code of Civil Procedure requires only that the court explain its decision with regard to

the ultimate facts to be found, not that it made detailed findings on individual evidential facts. (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524.)

II

Rowland's second amended complaint had 14 counts. Moving for summary, judgment, the county argued that all but the first of Rowland's claims were barred by the three-year statute of limitations in Code of Civil Procedure section 338, subdivision 1, the one-year limit of Code of Civil Procedure section 340 or the four-year limit of Code of Civil Procedure section 343. The county conceded that the first claim was substantially the same as the claim made in Rowland's original timely complaint. Rowland contended that all except the twelfth cause of action related back to the original complaint; he also raised issues of equitable tolling, waiver and estoppel and continuing violations. At the hearing, the court stated that the second through fourteenth causes of action rested on facts distinct from those set forth in the first cause, although it recognized that the second and fifth causes of action overlapped with the first. The count's summary judgment motion was granted on all but the first cause of action.

The seventh, ninth, tenth and eleventh cause of action were properly dismissed. The seventh alleges racially discriminatory working conditions throughout Rowland's employment. Since it is not limited to the circumstances

surrounding the refusal to rehire alleged in the original complaint, it rests on a different "general set of facts" and therefore did not relate back. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600-601; 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, Section 1162, p. 579.) The ninth through eleventh not only cover the entire period of employment but allege discrimination in gender and nationality as well as race, and are apparently not limited to discrimination against Rowland but extend to others as well.

The court erred in dismissing the second and fifth causes of action which, like the original complaint, alleged illegal motives for the alleged decision not to rehire Rowland. The general set of facts involved in all three claims is the circumstances surrounding the decision not to rehire Rowland and the motives for that decision. All three involve the same "accident" (the no-rehire decision) and the same injury (the loss of the opportunity to return to work). (See *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 939.) All that distinguishes the claims factually is the allegation of a different motivation for the decision in each. Contrary to the county's claim, these different motives are not distinct "instrumentalit[ies] of causation" (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 616.) Nor is it relevant that the claims invoke different legal duties or theories of recovery, or that each may require proof of some facts not involved in the others. (*Smeltzley v. Nicholson Mfg. Co. supra*, at p. 940.)

The error, however, was harmless. At trial, Rowland was unable to show that the county had refused to rehire him.

Since the second and fifth causes of action, like the first rested on the alleged refusal to rehire, Rowland's proof would have failed as completely on those claims as on the first. The Chabot Ranch position was substantially similar to that at juvenile hall, and Rowland's insistence on special concessions before he interviewed for the Chabot Ranch job justified the county in not offering it to him. These findings would have been fatal to Rowland's claims that the refusal to rehire was in retaliation for expression of his political views (second cause of action) or in retaliation for his protest of racial harassment (fifth cause of action). Although summary judgment was improper, the final judgement was correct, and it is not reasonably probable that Rowland would have prevailed on his second or fifth causes of action had they been tried. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Rowland also contends that the court abused its discretion in allowing the county to amend its answer to plead some of the above statue of limitations defenses. However, the amendment in question simply changed the particular statutes alleged to be applicable to some of the causes of action; the county had already asserted that all claims were barred by a statute of limitations. Rowland had not shown how he was prejudiced and has provided no reason for questioning the court's exercise of discretion. The policy of liberality in allowing amendment of pleadings extends fully to amendment of an answer to allege a statute of limitations defense. (*Trower v. City and County* (1910) 157 Cal. 762, 769.)

Rowland failed to deposit jury fees 14 days before trail as then required for a civil jury under Code of Civil Procedure section 631, subdivision 5. On the first day of trial, he sought relief from the consequent jury waiver and from the fee requirement. Alternatively, he requested a continuance in which to raise the money for fees. Both requests were denied.

In 1980, Rowland had been granted permission to proceed in forma pauperis, but at trial he conceded that his financial condition had changed and that a new application was needed. Pursuant to California Rules of Court, rule 985(j), Rowland submitted an application for waiver of jury and reporter fees. Attached was a new in forma pauperis application which showed that Rowland had income sufficient to meet his expenses, including litigation expenses. Rowland did not claim to fall within either of the automatic fee waiver categories established by Government Code section 68511.3, subdivision (a) (6).

The court did not abuse its discretion in denying relief from the waiver under Code of Civil Procedure section 631 or in denying a continuance. Rowland admitted he was aware of the need to pay the fees or file an application for fee waiver 14 days prior to trial. He failed to do so, he told the court, only because he was "too busy" and "didn't think it would be a problem." Defense counsel did not want a jury and objected to any continuance. The court found no reasonable excuse for Rowland's lateness in filing the fees or waiver application, and also found his claim of inability to pay fees

unconvincing. Under these circumstances, it was not unreasonable to hold Rowland to his waiver.

Nor is there any merit in Rowland's contention that he was immune from California jury procedures because he sought relief under a federal statute. State procedural rules are generally applicable to actions brought under federal law in a state court. (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, Section 62, p. 91.)

In view of our conclusion to affirm, we need not consider the cross-appeal that the complaint should be dismissed for failure to bring it to trial within five years.

The judgment is affirmed.

DATED: APRIL 26, 1988

Low, P.J.

King J.

Haning J.

Judges of the California
Court of Appeals

APPENDIX C

**Court of Appeal of the State of California**

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION FIVE

Clark W. Rowlad,

Plaintiff and Appellant,

vs

No. A034490

Alameda County Probation Department

Alameda Sup.Ct. No. 529464-0

Defendant and Respondent.

BY THE COURT:

The petition for rehearing is denied.

Dated May 23, 1988

Low, P.J.

(Before Low, P.J., King, J., and Haning, J.)

APPENDIX D

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 5, No. AO34490
S005794

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
IN BANK

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ROWLAND, Appellant,

v.

ALAMEDA COUNTY PROBATION DEPARTMENT,
Respondent.

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Appellant's petition for review DENIED.

The request for an order directing publication of the opinion in the above-entitled cause is DENIED.

KAUFMAN

Acting Chief Justice

FILED: July 13, 1988

88-751 (2)

No.

Supreme Court, U.S.
FILED
NOV 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1988

CLARK ROWLAND,
*Petitioner,*

VS.

ALAMEDA COUNTY PROBATION DEPARTMENT,
*Respondent.*

**On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Five**

## OPPOSITION TO REVISED PETITION FOR CERTIORARI

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5 pp

## QUESTION PRESENTED

Did the Court of Appeal for the State of California correctly conclude that petitioner had failed to establish a prima facie case of intentional racial discrimination based on undisputed proof that petitioner unreasonably declined to interview for the job he sought?

## PARTIES TO PROCEEDING

The only parties to the proceeding are petitioner, Clark W. Rowland, and respondent, the Probation Department for the County of Alameda, California. Respondent knows of no other entities within the meaning of Supreme Court Rule 28.1 that should be disclosed to enable the Honorable Justices of this Court to evaluate the possibility of recusal.

No. _____

# In the Supreme Court

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OCTOBER TERM, 1988

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*Petitioner,*

VS.

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**On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Five**

## OPPOSITION TO REVISED PETITION FOR CERTIORARI

## JURISDICTIONAL BASIS

Petitioner asserts jurisdiction under 28 U.S.C. Section 1257(3), but no conflict in the federal law or significant federal question is presented as required by Supreme Court Rule 17.1. On the contrary, this case involves nothing more than petitioner's unwillingness to accept the well-reasoned judgment of the Court of Appeal. That judgment is based upon well settled law, and nothing in the opinion is inconsistent with the standards this Court has established in discrimination cases.

## STATEMENT OF THE CASE

The pertinent facts and history of the case are set forth in the opinion of the Court of Appeal at pages 8-20 of petitioner's appendix.

## REASONS FOR DENYING THE WRIT

Review is unnecessary here because no part of the unpublished opinion of the Court of Appeal is at odds with the decisions by this Court regarding the standards for a prima facie case of employment discrimination. *See, e.g., Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). As the Court of Appeal opinion shows, petitioner failed to establish a prima facie case because he refused without justification to interview for the job position he sought. (App. at 10-11) Under these circumstances, the relevant authority compelled entry of judgment for respondent. *Id.; Tagupa v. Board of Directors*, 633 F.2d 1309, 1311 (9th Cir. 1980); *Ibarbia v. Regents of University of California*, 191 Cal.App.3d 1318, 1328-1329 (1987). Petitioner's unfounded dissatisfaction with this conclusion does not present the type of issue this Court should resolve. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

The other issues raised are equally undeserving of review. There is no principle of law which compelled the California trial court to follow Federal Rule of Civil Procedure 52 when it issued its findings of fact and conclusions of law simply because federal substantive law applied. Moreover, Rule 52 and the pertinent California statute, Code of Civil Procedure Section 632, in fact have very similar requirements. *Compare Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943), *with Richter v. Walker*, 36 Cal.2d 634, 639 (1951), *Security Pacific Nat. Bank v. Chess*, 58 Cal.App.3d 555, 568 (1976). Consequently, petitioner does not—because he cannot—demonstrate how he was prejudiced in this case or how the goals of federal law would be impaired by application of this procedural statute.

Nor is there any conceivable reason for this Court to consider in the context of this action the scope of remedies available in a discrimination case. Since judgment was entered against petitioner, respondent never briefed that issue below, and the Court of Appeal had no reason to address the issue.

The petition should accordingly be denied because this Court is not the appropriate forum for petitioner to raise phantom issues and to reargue his version of the unique facts in this case.

DATED: November 8, 1988.

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By PETER W. DAVIS
*Counsel of Record for Respondent*